Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term 2002

ESTRELLITA G. MIGUEL,

Petitioner,

vs.

THE BANK OF NEW YORK TRUSTEE, under the Pooling & Servicing Agreement Series 1995 B; ALLIANCE BANCORP, a corporation; and COUNTRYWIDE FUNDING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to the Truth-In-Lending Act provisions of Sections 1635(f) and 1641(c) of Title 15, is timely service of a borrower's written notice of cancellation, which is sent to the servicing agent only, effective notice to his or her current, unidentified assignee of the timely exercise of the right to rescind the underlying mortgage transaction?

2. Pursuant to the Truth-In-Lending Act provisions of Sections 1635(f) and 1641(c) of Title 15, if timely service of a borrower's written notice of cancellation, which is sent to the servicing agent only, is not effective notice to his or her current, unidentified assignee of the timely exercise of the right to rescind, does a court of appeals have the power or is it an abuse of discretion for it to reverse on appeal a factual determination made by the district court that the assignee had admitted that it had had timely knowledge of such notice nevertheless, and to remand for the entry of a dismissal with prejudice for lack of subject matter jurisdiction?

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I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon Section 1635 of Title 15 of the United States Code.

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on March 24, 2003, within ninety days (weekends excluded) of the denial of reconsideration and the amendment on December 23, 2002, of the court of appeals' published opinion, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The court of appeals' amended decision being challenged is set forth in the Appendix to this Petition, reported at 309 F.3d 1161 (9th Cir. 2002), and the relevant text of the Truth-In-Lending ("TILA") principal governing provisions of law, Section 1635(f) and Section 1641(c) of Title 15, are footnoted in the text of this Petition.

III. STATEMENT OF THE CASE

Miguel and her husband refinanced their home with Alliance Bancorp. The loan papers were dated December 1, 1994, and the loan transaction closed on December 2, 1994.

Alleging TILA violations, Miguel sent a timely cancellation letter to the servicing agent, Countrywide, who she thought was her mortgagee, on November 7, 1997, demanding rescission, which was not responded to.

Unknown to Miguel at the time, The Bank of New York Trustee ("BONY") was the holder of her mortgage, having received an undisclosed assignment of her mortgage dated December 1, 1994, the day before closing, which was actually "table-funded," yet not recorded until October 1996.

Miguel filed suit in district court for rescission against Countrywide on April 21, 1998, and then for the first time, learning that BONY was the owner of her mortgage, amended her complaint -- with the approval of the district court -- on June 17, 1998, to add BONY as a defendant.

In pretrial proceedings, the district court on June 3, 1999, rejected BONY's contention that Miguel's claims were time-barred because she had not sent her cancellation letter to BONY, but to its servicing agent instead, finding that BONY had received Miguel's notice of rescission and had knowledge thereof within three years of the loan transaction:

> Defendant Bank of New York raises for the first time in its reply memorandum the argument that Plaintiff's claims are time-barred because her attempted rescission was ineffective, as it was not submitted to "the creditor." . . . . Defendant Bank of New York contends that Plaintiff's attempted rescission was ineffective because it was mailed to Countrywide Funding Corporation, Defendant Bank of New York's servicing agent rather than Alliance Bancorp [the original creditor]. .
> * * * *
> [T]he court concludes in this case that it is both fair and consistent with the purpose of TILA to hold that Plaintiff's notice of rescission was effective as to Defendant Bank of New York where Plaintiff sent the notice directly to Defendant Bank of New York's agent. This is so particularly when Plaintiff was told to mail her payments to Defendant Bank of New York's agent.
> * * * *
> Although the court concludes that Plaintiff's notice of rescission was effective, it is unable to determine at this stage of the litigation whether it was timely. If the facts are as Plaintiff maintains [that there was a TILA violation], the Notice of Right to Cancel was defective. If the Notice was defective, Plaintiff had three years in which to rescind her loan agreement. **Defendant Bank of New York admits that it received Plaintiff's notice within three years of the loan**

> **transaction**. ("Order Denying Defendant Bank of New York's Motion For Summary Judgment, etc.," June 3, 1999.) [Emphasis added].

The case proceeded to trial on June 1, 1999, at which time the district court found TILA violations and that Miguel had properly rescinded her mortgage, and granted judgment in her favor.[1] That was the only issue tried by pretrial order. Alliance Bancorp and BONY appealed.

On appeal, the court of appeals first reversed with instructions to dismiss the case with prejudice for lack of subject matter jurisdiction, holding that service of a TILA cancellation notice on the servicing agent was not effective notice to an assignee, and that there was no evidence below that BONY had had actual knowledge of that cancellation notice within three years of the consummation of the mortgage loan.

Following Miguel's petition for reconsideration, calling to the attention of the court of appeals that the district court had found prior to trial that BONY "admits that it received Plaintiff's notice within three years of the loan transaction," *supra*, the court of appeals amended its published opinion to inexplicably delete its initial conclusion that "Miguel has presented no evidence that the Bank received notice of cancellation within the three-year limitation period prescribed by statute," but nevertheless, still remanded with instructions for the district court to dismiss the TILA case *with prejudice*, continuing to ignore the district court's record factual finding altogether and the fact that no such evidence of actual notice was presented at trial because of the district court's earlier pretrial order which was at trial considered to be the law of the case.

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[1] See Section 1635(f) in relevant part: "an obligor's right of rescission shall expire three years after the date of consummation of the transaction."

IV. LEGAL ARGUMENT

This Petition is based upon two legal arguments, *first*, that the court of appeals was in error when it concluded that serve of a TILA notice of cancellation upon a servicing agent is not service of notice of cancellation upon an assignee as a matter of law, and, *second*, that that the court of appeals was in error, were either (a) such actual service upon an assignee or (b) the actual knowledge of cancellation by an assignee required, when it overrode the contrary factual finding of the district court, *supra*, and in any event remanded the case to the district court with instructions to dismiss the case with prejudice for lack of subject matter jurisdiction in the absence of any such factual inquiry at trial due to Miguel's justified reliance upon the district court's pretrial orders.

1. The service of a timely TILA notice of cancellation upon a servicing agent is effective against an assignee.

The court of appeals was mistaken, ignoring two thousand years of the law of agency and is in conflict with every federal court that has considered the issue, when it concluded that "no authority supports the proposition that notice to Countrywide should suffice for notice to the Bank."

For instance, in Greer v. O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002), the eleventh circuit court of appeals only thirteen weeks before the court of appeals' first decision here, held that a mortgage servicer is not only a "real party in interest" and the "legal representative of the mortgagee" in actions concerning the mortgage, but cited approvingly, by way of example, language from an Alabama district court's decision in Myers v. Citicorp Mortgage, Inc., 878 F. Supp. 1553, 1558 (M.D. Ala. 1995), *affirmed*, 208 F.3d 1011 (11th Cir. 2000), that for practical purposes "the servicing agent of a mortgage was the 'assignee of the creditor as defined in the Federal Truth in Lending Act'".[2]

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[2] See Section 1641(c): "any consumer who has the right to rescind a transaction under section 1635 of this title may

In Myers, *supra*, the factual issue centered around the manner in which mortgages are freely exchanged back-and-forth between servicers and assignees in the secondary mortgage market without notice, much like a basketball is tossed about in the NBA -- the district court in Myers determining that the mortgage servicer there had briefly held ownership rights as a part of its servicing contract; no such factual inquiry was ever made in Miguel's case, however, concerning the details of Countrywide's servicing contract, another key reason why dismissal with prejudice was clearly premature and inappropriate here under any circumstances.

An Oklahoma federal district court recently was similarly satisfied that a TILA rescission could be effective if notice of cancellation were served upon the servicing agent, ironically dismissing the borrowers' case there pursuant to a *res judicata*/compulsory counterclaim theory, because the borrowers had not included the servicing agent in any counterclaim in a contemporaneous state court foreclosure action in which they chose to default, relying on their federal TILA lawsuit instead, the Oklahoma district court concluding that "the servicing agent of the original obligee and mortgagee is in privity with it and its assignee" as far as TILA rescission claims are concerned, yet was not sued in state court by the borrowers Kittel v. First Union Mortgage Corporation, 2001 U.S. Dist. LEXIS 24403 (W.D. Okl. 2001), *stayed on other grounds*, 303 F.3 1193 (10th Cir. 2002) ("the Kittels do not contend that the state court could not have acquired jurisdiction over First Union Mortgage Corporation," the servicing agent in Kittel, so as to have asserted its TILA rescission defense against the mortgage servicer there).

Federal law should treat creditors and borrowers alike; there should obviously as a matter of law not be one rule concerning TILA standing for creditors and an opposite rule concerning TILA standing for borrowers.

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rescind the transaction as against any assignee of the obligation."

2. If service of a TILA notice of cancellation to be effective must be served upon an assignee and not upon its servicing agent, and if an assignee needs to have actual timely knowledge of such service of a TILA cancellation notice regardless of such knowledge by its servicing agent, that is a factual determination as to the existence of subject matter jurisdiction for the district court and not for the circuit court to have made.

It was fundamentally unfair, without precedent, and contrary to the decisions of all other federal courts having considered the matter, *supra*, for the court of appeals in reversing, remanding for a dismissal with prejudice for lack of subject matter jurisdiction, to so cavalierly reject, without a single citation to relevant authority, the pretrial finding of the district court that BONY had had timely knowledge of Miguel's TILA cancellation supporting the district court's judgment following a full trial on the merits of Miguel's TILA claim.

For instance, in Beach v. Owen Federal Bank, 523 U.S. 410 (1998), a judgment on the merits by the Florida state courts *and not a dismissal for lack of subject matter jurisdiction*, 692 So.2d 146 (1997), *affirming* 670 So.2d 986 (1996) (*en banc*), was upheld by the United States Supreme Court – the state lower court case in Beach never having been dismissed for lack of subject matter jurisdiction despite a finding of a lack of timely cancellation on the part of the borrower, as here, which in both Beach and Miguel was a factual issue and not grounds for dismissal with prejudice as a matter of law.

State and federal district courts clearly have jurisdiction over such cases pursuant to Section 1641(c) of Title 15 of the United States Code. The court of appeals in Miguel has confused "subject matter jurisdiction" with "subject matter enforcement jurisdiction" -- the latter depriving federal courts, having subject matter jurisdiction, from enforcing that TILA subject matter jurisdiction where factually it can be shown that the cancellation was not timely.

Even if the district court had concluded, to the contrary, that BONY had not had timely knowledge of Miguel's cancellation, since the loan was "table-funded," *supra*, as a matter of controlling state law as to the validity of the underlying mortgage and as to the status of the parties, BONY, who actually funded the Miguel loan, was in fact the "original creditor" of Miguel as a matter of state law, Beneficial Hawaii, Inc. v. Kida, 96 Haw. 289, 30 P.2d 895 (2001), rendering the factual notice inquiry overridden by the court of appeals in this instance as a matter of controlling state law both moot and utterly redundant.

BONY, furthermore, should have been *estopped* as a matter of sound judicial policy from changing its story on appeal to assert that it had no timely knowledge of Miguel's TILA cancellation letter sent to its agent after all.

Not only did BONY not contest the district court's pretrial finding before trial, *supra*, when it was first entered.

BONY concealed from Miguel the fact of its ownership of the mortgage until after she had cancelled and filed suit and was outside the three-year limitation, having table-funded the loan, *supra*, immediately taking a written assignment even the day before the loan was actually made, yet having cagily waited for two years before its public recordation, intentionally or otherwise misleading Miguel, no knowledge given to her that an entity called BONY even existed, leading Miguel furthermore to reasonably believe Countrywide to be the current assignee.

Admitting to the district court that it had known of the cancellation within three years of the loan's making, BONY has thus sought to take inconsistent positions before the district court and on appeal, for which it should now be estopped from denying having had such knowledge; see, *e.g.*, United States v. Bentson, 947 F.2d 1353, 1354 (9th Cir. 1991), *cert. denied*, 504 U.S. 958 (1992); Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 218-219, 664 P.2d 745 (1983) (citations omitted):

> This type of equitable estoppel is also known as judicial estoppel. This doctrine is not simply one of estoppel but "partakes rather of positive rules of procedure based on manifest justice and, to a greater or less [sic] degree, on consideration of the orderliness, regularity, and expedition of litigation." At stake is the integrity of the judicial process. A party is estopped from playing "fast and loose" with the court or blowing "hot and cold" during the course of litigation.

V. CONCLUSION

For all of the above reasons, the amended decision of the court of appeals should be reversed, and the case remanded to the court of appeals for a determination of the remaining issues on appeal that as a result of its amended opinion remain unaddressed.[3]

Respectfully submitted,

GARY VICTOR DUBIN
Counsel for Petitioner
Estrellita G. Miguel

Honolulu, Hawaii
March 24, 2003

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[3] The remaining two issues are: (1) whether Miguel should have been permitted an evidentiary hearing to first determine whether any inability on her part to refinance within the time specifically allotted by the district court following her TILA award, which inability was due to the adverse effect of BONY's wrongful state court action upon her creditworthiness, should be considered in modifying the terms and conditions of the conditional rescission awarded to her, and (2) whether an assignee is liable for her attorneys' fees and costs pursuant to the TILA judgment that was entered by the district court, which of course also bears materially on her financial ability to successfully refinance.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTRELLITA G. MIGUEL, *Plaintiff-Appellant,* GARY VICTOR DUBIN, *Real-party-in-interest-Appellant,* v. COUNTRY FUNDING CORP, *Defendant,* and THE BANK OF NEW YORK TRUSTEE, under the Pooling & Servicing Agreement Series 1995 B; ALLIANCE BANCORP, a corporation, *Defendants-Appellees.*	No. 00-17338 D.C. No. CV-97-01593-DAE

ESTRELLITA G. MIGUEL, *Plaintiff-Appellee,* v. COUNTRY FUNDING CORP, *Defendant,* and THE BANK OF NEW YORK TRUSTEE, under the Pooling & Servicing Agreement Series 1995 B, *Defendant-Appellant,* GARY VICTOR DUBIN, *Real-party-in-interest-Appellee.*	No. 00-17339 D.C. No. CV-97-01593 ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
May 7, 2002—Honolulu, Hawaii

Filed November 4, 2002
Amended December 23, 2002

Before: J. Clifford Wallace, A. Wallace Tashima and
Richard C. Tallman, Circuit Judges.

Opinion by Judge Wallace

PUBLISHER'S NOTE:

Page(s) 3 missing in original.

COUNSEL

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Philip J. Leas, Cades Schutte Fleming & Wright, Honolulu, Hawaii, for the defendant/appellee

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ORDER

The slip opinion filed November 4, 2002, is hereby amended as follows:

On page 10, first paragraph, line 13, delete "and Miguel has presented no evidence that the Bank received notice of cancellation within the three-year limitation period prescribed by the statute."

With this amendment, the panel as constituted above has unanimously voted to deny Appellants/Cross-Appellees petition for rehearing.

The petition for rehearing is DENIED.

OPINION

WALLACE, Senior Circuit Judge:

Estrellita G. Miguel (Miguel) brought an action under the Truth-in-Lending Act (Act) seeking to dissolve a $520,000 mortgage on her residence. Miguel appeals from the amended judgment of the district court, arguing (1) the district court should not have dismissed defendant Alliance Bancorp (Alliance) on the ground that Alliance had not been properly served with a Truth-in-Lending Act rescission notice; (2) the district court erred in denying Miguel her attorneys' fees from defendant Bank of New York (Bank) on the ground that it

was not the original creditor; (3) the district court erred by holding that Miguel's right to rescind the security interest was conditioned on her repaying the loan proceeds, less any finance, closing, and interest charges; and (4) the district court should have held an evidentiary hearing to determine whether Miguel was able to refinance. Miguel's attorney argues that he has standing to appeal the attorneys' fee issue as a real party in interest.

On cross-appeal, the Bank argues (1) the district court lacked subject matter jurisdiction to grant Miguel relief against the Bank because Miguel commenced the action against the wrong entity on the last day of the statutory period set forth in 15 U.S.C. § 1635(f), and the district court's order allowing Miguel leave to add parties violated Congress's limited grant of jurisdiction; and (2) the district court erred in its calculation of the amounts due from Miguel to the Bank.

We have jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. We remand with instructions to dismiss the action for lack of subject matter jurisdiction.

I.

Miguel and her husband had owned their home for eight years, when in 1994, she refinanced her mortgage with Alliance. The closing occurred on December 1, 1994, with the signing of a promissory note and execution of a mortgage on the property as security for the loan.

The Bank acquired its lien against Miguel's property by assignment from Alliance on October 17, 1996. On November 7, 1997, Miguel and her husband sent, by certified mail, a mortgage cancellation notice to Countrywide Funding Corporation (Countrywide), The Bank's designated agent. They then filed a complaint with the district court on December 1, 1997, seeking rescission of the mortgage.

On March 19, 1998, Miguel learned that Countrywide was merely an agent for the lienholder Bank, rather than the lienholder itself. Thereafter, on March 26, 1998, Miguel filed a motion for leave to file an amended complaint which specifically sought to substitute the Bank in place of Countrywide. There is no evidence in the record to show that the Bank had any notice of the motion or the existence of the lawsuit. March 30, 1998, marked the 120th day after Miguel's suit was filed. On April 21, 1998, Miguel filed a second motion for leave to file a second amended complaint, seeking to add additional parties, including the Bank. Permission to file the second amended complaint was granted on May 28, 1998. On June 17, 1998, Miguel filed her second amended complaint, naming Alliance, the Bank (individually and as trustee), Independent National Mortgage Corporation (IndyMac), and Countrywide as defendants. Miguel later dismissed Countrywide with prejudice, and IndyMac and the Bank (individually) without prejudice. On November 9, 1998, Miguel served the Bank as trustee.

If proper notice of recission rights is not delivered to the consumer at the time of closing, and the lender fails to cure the omission by subsequently providing the proper information, the consumer's usual right to rescind within three days of closing is extended to three years. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3). On January 13, 1999, the district court dismissed the second amended complaint as to Alliance because it was served outside the three year period provided for in 15 U.S.C. § 1635(f). In its initial opinion, the district court concluded that Miguel's rescission rights did not expire until December 1, 1997, because Alliance had violated the Act by failing to provide proper notice to Miguel of the expiration date of her right to rebind the loan agreement without penalty. [*Id.*] The court concluded that Miguel's actions were sufficient to effect rescission, and that the Bank, as Alliance's assignee, was liable for Alliance's Act violations and was therefore required to rescind the security interest under 15 U.S.C. § 1641(c).

The district court subsequently granted the Bank's motion to amend, holding that while Miguel was entitled to rescission, her ability to rescind was conditioned on her tender of repayment of the loan proceeds, less any finance, closing, and interest charges. Further, the district court held that the Bank was not liable for Act damages or attorneys' fees and costs because Alliance's violations were not "apparent on the face" of the documents. Finally, the district court held that because the Bank itself never violated the Act, it was not required to release its security interest in Miguel's property until Miguel tendered repayment, less any finance or other charges.

Miguel appealed from the judgment, and the Bank cross-appealed, arguing that under the statute of repose of 15 U.S.C. § 1635(f), the district court lacked subject matter jurisdiction to add a new party under Fed. R. Civ. P. 15 after the substantive rights under the Act had expired.

II.

We review de novo for subject matter jurisdiction. *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (citation omitted). Challenges to subject matter jurisdiction cannot be waived and may be raised at any point in the proceeding. *See United States v. Hays*, 515 U.S. 737, 742 (1995). The party asserting federal jurisdiction has the burden of establishing it. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). We will first address the jurisdictional argument raised in the Bank's cross-appeal, because if the Bank is correct that the federal courts lack subject matter jurisdiction over the dispute, we should not reach the merits of the parties' arguments.

[1] Section 1635(f) of Title 15 states that "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first . . . ." The Bank asserts that the district court, and now this court, lack jurisdiction because

Miguel commenced her action only against Countrywide, rather than against the Bank, within the statutory period set forth in § 1635(f), and that the district court's order allowing Miguel leave to add parties therefore violated Congress's limited grant of jurisdiction.

[2] "When Congress enacts statutes creating public rights or benefits, it can impose time limits on their availability." *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998); *accord Shendock v. Dir., Office of Workers' Comp. Programs*, 893 F.2d 1458, 1462 (3d Cir. 1990). These limits, when completely extinguishing the right previously created, deprive courts of jurisdiction. *Ellis*, 160 F.3d at 706. In *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), the Supreme Court held that "section 1635(f) completely extinguishes the right of rescission at the end of the 3-year period." *Id.* at 412. The court stated:

> Section 1635(f) . . . takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the "right of rescission [under the Act] shall expire" at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous. There is no reason, then, even to resort to the canons of construction that we use to resolve doubtful cases, such as the rule that the creation of a right in the same statute that provides a limitation is some evidence that the right was meant to be limited, not just the remedy.

Id. at 417, *quoting* 15 U.S.C. § 1635(f) (alteration in original), *citing Mid State Horticultural Co. v. Penn. R.R. Co.*, 320 U.S. 356, 360 (1943); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424,

427, n.2 (1965); *Davis v. Mills*, 194 U.S. 451, 454 (1904). The Court concluded, "We respect Congress's manifest intent by concluding that the Act permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." *Id.* at 419. Likewise, we previously have held that section 1635(f) represents an "absolute limitation on rescission actions" which bars any claims filed more than three years after the consummation of the transaction. *King v. California*, 784 F.2d 910, 913 (9th Cir. 1986). Therefore, § 1635(f) is a statute of repose, depriving the courts of subject matter jurisdiction when a § 1635 claim is brought outside the three-year limitation period. Because Miguel did not attempt to rescind against the proper entity within the three-year limitation period, her right to rescind expired.

[3] Miguel argues that she should have been allotted an additional year in which to file suit after the expiration of the three-year period afforded by the statute. While Miguel is correct that 15 U.S.C. § 1640(e) provides the borrower one year from the refusal of cancellation to file suit, that is not the issue before us. Rather, the issue is whether her cancellation was effective even though it was not received by the Bank — the creditor — within the three-year statute of repose. We hold that it was not. While the Bank's servicing agent, Countrywide, received notice of cancellation within the relevant three-year period, no authority supports the proposition that notice to Countrywide should suffice for notice to the Bank. Therefore, her right to cancellation was extinguished as against the Bank. When congressionally-created limitations on congressionally-created public rights and benefits completely extinguish the right previously created, courts are deprived of jurisdiction. *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084-85 (9th Cir. 2001).

Miguel next argues that under Federal Rule of Civil Procedure 15(c), the amendment of the complaint to add the Bank as a defendant after the expiration of the statutory period related back to the original filing of suit and was therefore

sufficient to constitute cancellation notice to the Bank within the three-year period. Yet Rule 15(c)(3) requires notice within the time period provided by Rule 4(m) when the amendment seeks to change the party. There is no evidence in the record that the Bank had notice of the suit within the 120 day period required by Rule 4(m). Because the complaint named only Countrywide, the servicer of the loan, it was not an effective cancellation, and the right in question was extinguished when the three-year period expired.

Moreover, Rule 15(c) may not be used to extend federal jurisdiction. The Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). *See also USM Corp. v. GKN Fasteners Ltd.*, 578 F.2d 21, 22 (1st Cir. 1978) (holding that "Rule 15 is not to be viewed as enlarging or restricting federal jurisdiction. The doctrine of relating back in time to the original pleadings does not affect the jurisdiction of the district court here in any manner.") (citation and footnote omitted); Fed. R. Civ. P. 82 ("[The Federal Rules of Civil Procedure] shall not be construed to extend or limit the jurisdiction of the United States district courts . . . .").

Nor do the facts that the Bank's servicing agent, Countrywide, was served within the "extended" three-year rescission period and that the Bank was added as a defendant well in advance of the expiration of § 1640's one-year statute of limitations for suing on a § 1635 failure-to-effect-rescission claim alter the jurisdictional landscape. The Bank was not required to cancel the loan because Miguel did not notify the Bank of cancellation within the limited three-year period. Because cancellation was not effected during the three-year period, the additional year statute of limitations provided by § 1640 is irrelevant; it relates to the time for filing suit once cancellation has been wrongly refused. 15 U.S.C. § 1635(f). In this case, Miguel did not provide the Bank with notice of cancellation within the three-year statutory period, so the Bank could

not have wrongly refused Miguel's request to cancel. Therefore, § 1640 does not apply.

[4] Because we hold that the district court lacked subject matter jurisdiction over this claim, we do not reach the merits of the parties' arguments.

[5] REMANDED to the district court for dismissal with prejudice.

Supreme Court, U.S.
FILED

02149 5 MAR 24 2003

OFFICE OF THE CLERK

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THE BANK OF NEW YORK TRUSTEE, under the Pooling & Servicing Agreement Series 1995 B; ALLIANCE BANCORP, a corporation; and COUNTRYWIDE FUNDING CORPORATION,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUPPLEMENTAL APPENDIX

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I. Findings of Fact and Conclusions of Law, filed August 17, 2000

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ESTRELLITA G. MIGUEL,	)	CV. NO. 97-01593 DAE
	)	
Plaintiff,	)	FINDINGS OF FACT AND
vs.	)	CONCLUSIONS OF LAW
	)	
ALLIANCE BANCORP, et al.,	)	
	)	
	)	*FILED AUGUST 17, 2000*
Defendants.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court conducted a bench trial in this action on August 2, 2000. Gary Victor Dubin, Esq., appeared on behalf of Plaintiff; Gary Y. Okuda, Esq., appeared on behalf of Defendant The Bank of New York ("BNY").

BACKGROUND

This case arises from Plaintiff's attempt to rescind her mortgage and mortgage note under the Truth-in-Lending Act, 15 U.S.C. 1601-1693 (1968) ("TILA"), and its accompanying regulations, codified at 12 C.F.R. § 226 (1981) ("Regulation Z") . Plaintiff filed her Complaint on December 1, 1997 against BNY, BNY as trustee, Independent National Mortgage Corp. ("Indy Mac"), Countrywide Funding Corporation ("Countrywide") and Countrywide Home Loans, seeking to enforce her TILA rescission rights, void Countrywide's security interest in her property and to recover statutory damages and attorney's fees based on TILA violations. Then, on June 17, 1998, Plaintiff filed a Second Amended Complaint naming Alliance

Bancorp as a Defendant.

During the past two-and-one-half years of litigation, however, most of the Defendants have been dismissed from the case. First, Indy Mac was dismissed from the case on July 15, 1998. Then, Alliance Bancorp was dismissed on January 13, 1999, because Plaintiff's right to rescind against it was time-barred.

On April 5, 1999, Defendant BNY filed a summary judgment motion and on May 14, 1999, Plaintiff filed its own summary judgment motion. After hearing these motions on June 1, 1999, the court denied both Motions.

The court could not determine at the summary judgment stage whether BNY was timely served with notice of rescission since there were questions of material fact surrounding that determination. Thus, at trial, the court heard testimony from Plaintiff and her husband regarding whether Plaintiff received the proper TILA disclosures at closing. Defendant BNY presented no witnesses at trial.

Having considered the testimony and evidence presented at trial, the stipulations made by the appearing parties, the briefs of counsel, judging the credibility of witnesses and the weight of evidence, and for the reasons set forth below, the court now enters the following Findings of Fact and Conclusions of Law in accordance with its obligations under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 52(c).

FINDINGS OF FACT

1. Estrellita F. Miguel ("Plaintiff"), and her spouse, VIC Garo Miguel, own the subject property ("Property") located at 98-797 Ainanui Loop, Aiea, Hawaii 96701. The couple has owned the Property continuously for the past fourteen years.

2. Plaintiff has held a mortgage solicitor's license since September 25, 1992. However, her undisputed testimony states that she had received no formal TILA training at the time of the closing of the subject mortgage loan, and acted as

a mortgage solicitor.

3. Plaintiff has also been a real estate agent since 1985.

4. In 1994, Plaintiff approached a number of possible brokers, including Citizens Mortgage, to assist her in refinancing her home. Ultimately, Plaintiff chose Citizens Mortgage and it found her a lender, Alliance Bancorp.

5. In or about the beginning of December 1994, the Miguels filled out a Uniform Residential Loan Application and refinanced the Property with Alliance Bancorp, in the principal amount of $532,000. The Prepaid Finance Charge, including the closing costs, equals $12,177.04. Thus, the principal amount less "any finance or other charge" is $519,822.96.

6. According to the Settlement Statement, signed by Plaintiff and her husband, the mortgage loan, together with cash provided by the Miguels in the amount of $23,010.39, paid off their then-existing obligations. Further, its accuracy was affirmed by the Miguels when they signed the HUD-1 Certification.

7. Plaintiff attended the loan closing and the "closer" was also present. There were no other witnesses present at the closing.

8. At the closing on or about December 1, 1994, in conjunction with the promissory note, the Miguels signed and executed a mortgage on the Property as security for the loan.

9. The Miguels also signed several federal TILA financial disclosures on or about December 2, 1994.

10. The Miguels received and signed Escrow Instructions on December 2, 1994.

11. The Miguels received and signed an Addendum to Escrow Instructions, dated December 1, 1994, that provided that a condition of closing was the execution of a "Signed Good Faith, Signed REG/Z, Fair Lending, Authorization Form."

12. The Miguels received and signed a Federal Truth-In-Lending Disclosure Statement. However, Plaintiff's original copy is undated, while Defendant's copy is dated December 2, 1994.

13. Plaintiff received and signed a Notice of Right to Cancel. However, Plaintiff's original copy does not have the operative dates filled in as required by TILA.

14. Plaintiff's testimony at trial states that she never signed or received a properly dated and filled in copy of the Notice of Right to Cancel.

15. Defendant's copy of the Notice of Right to Cancel has both of the Miguel 1st signatures and all the operative dates filled in as required by TILA.

16. Plaintiff's signature on the Notice of Right to Cancel also acknowledges that she received two completed copies of the Notice of Right to Cancel.

17. However, Plaintiff's testimony states that her and her husband were delivered only one undated and incomplete copy of the Notice of Right to Cancel form at the closing of the loan.

18. The One and the Same Name Affidavits were received and signed by the Miguels and notarized on December 2, 1994.

19. The Document Correction Compliance Agreement was received and signed by Plaintiff and notarized on December 2, 1994.

20. The Miguels received and signed the Borrower's Certification and Authorization.

21. The Miguels received and signed an Itemization of. Amount Financed, dated December 2, 1994.

22. The Miguels received and signed the Addendum to the Settlement Statement, dated December 2, 1994.

23. The Miguels received and signed the Loan Servicing Disclosure Statement, dated December 2, 1994.

24. Plaintiff knew at the time of the closing that any statements she made in connection with the loan had to be accurate.

25. The mortgage was properly assigned by Alliance Bancorp to BNY on October 17, 1996.

26. On November 7, 1997, Plaintiff and her husband sent by certified mail, a mortgage cancellation notice to BNY's designated agent.

27. Following the attempted rescission letter, Plaintiff stopped payment on the mortgage loan.

28. Plaintiff has paid a total of $198,629.68 to the original lender and/or Defendant BNY. This number includes her monthly payments of principal and interest, prepayments of principal and interest, closing costs, and the $23,010.39 provided in the Settlement Statement that she gave Alliance Bancorp at the closing to cover the remainder of her then-existing obligations.

29. Following the filing of Plaintiff's lawsuit, in 1998, Defendant brought foreclosure proceedings against the Miguels in the First Circuit Court of Hawaii, CV. No. 98-2749-06, since it did not honor the Miguels' attempted rescission notice.

30. Evaluating the credibility of the Plaintiff witness, the court finds the evidence presented by Plaintiff to be credible.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the action pursuant to 15 U.S.C. §~ 1601 et seq., and 28 U.S.C. § 1331.

2. TILA contains a "buyer's remorse" provision that allows borrowers three business days to rescind, without penalty, a consumer loan that uses a principal dwelling as security. 15 U.S.C. § 1635(a).

3. Regulation Z requires that documents pertaining which the consumer can rescind the loan agreement without penalty. 12 C.F.R. § 226.23(b).

4. 12 C.F.R. § 226.23(b), (emphasis added), states:

> [I]n a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following . . . (5) [t]he date the rescission period expires. .

5. If a consumer acknowledges in writing that she received the required TILA disclosures, a rebuttable presumption of delivery is established. 15 U.S.C. § 1635(c).

6. To ensure consumer protection, Congress requires strict enforcement of TILA and Regulation Z, and as a result, "[t]echnical or minor violations of TILA or Reg Z, as well as major violations, impose liability on the creditor and entitle the borrower to rescind." Semar, 791 F.2d at 704; Jackson v. Grant, 890 F.2d 118, 120 (9th Cir. 1989); see also, Huff v. Stewart-Gwinn Furniture Co., 713 F.2d 67, 69 (4th Cir. 1983) (holding that minor violation of TILA or Reg Z impose liability even if the consumer "was not misled and was given meaningful and correct disclosure of crucial credit terms").

7. Regulation Z " 'makes clear that failure to fill in the expiration date of the rescission form is a violation of the TILA,' . . . , without regard to whether the omission was material." Semar, 791 F.2d at 704 (quoting Williamson v. Lafferty, 698 F.2d 767, 768-69 (5th Cir. 1983)).

8. Plaintiff acknowledged in writing, via the signed Notice of Right to Cancel, that the lender delivered and she received two completed copies of the Notice of Right to Cancel.

9. Plaintiff has overcome the rebuttable presumption of proper delivery, however, since her undisputed testimony

establishes that the Notice of Right to Cancel that she signed lacked the specific operative expiration date of her right to rescind without penalty and the lender only delivered and she only received one copy of the Notice of Right to Cancel that omitted the operative dates.

10. The lender, Alliance Bancorp, violated TILA's requirements by failing to inform Plaintiff of the expiration date of the rescission rights and/or deliver two completed copies of the form to Plaintiff.

11. Alliance Bancorp never cured the lack of proper TILA disclosures since it is Plaintiff's undisputed testimony that she never saw the completed Notice of Right to Cancel until the trial.

12. If a lender violates TILA's requirements, the borrower may rescind a consumer loan secured by the borrower's primary dwelling. Semar v. Platte Valley Federal Savings & Loan Association, 791 F.2d 699, 704 (9th Cir. 1986) ; 15 U.S.C. § 1635(a).

13. If proper notice of rescission rights is not delivered to the consumer and the lending institution fails to cure the omission by subsequently providing the proper information, the consumer's rescission rights are extended from within three days to within three years after consummation of the credit transaction. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a) (3).

14. Under Regulation Z, consummation "means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a) (13).

15. Since Alliance Bancorp violated TILA's requirements by failing to provide proper notice to Plaintiff of her rescission rights and the credit transaction consummated on December 1, 1994, Plaintiff's rescission rights did not expire until December 1, 1997.

16. A consumer exercises her right to rescind under TILA "by notifying the creditor, . . ., of his intention to do so. 15 U.S.C. § 1635(a) . Further, "any consumer who has the right to rescind a transaction under section 1635 of [TILA]

may rescind the transaction as against any assignee of the obligation." 15 U.S.C. § 1641(c).

17. By sending, via certified mail, a mortgage cancellation notice to the Alliance Bancorp's assignee, Defendant BNY, on November 7, 1997, Plaintiff effectively and timely exercised her right to rescind under TILA since she canceled the transaction prior to December 1, 1997.

18. Consistent with TILA's strict compliance and enforcement, "Congress did not intend for TILA to apply only to sympathetic consumers; Congress designed the law to apply to all consumers, who are inherently at a disadvantage in loan and credit transactions." Semar, 791 F.2d at 705; see also, Jackson, 890 F.2d at 122 (holding that even though Plaintiff received many of the benefits of the agreement that she was rescinding, rescission was proper over two years later since she received no notice of her TILA cancellation right and the expiration date at the time of the consummation of the agreement) .

19. The fact that Plaintiff was a mortgage solicitor and real estate agent at the time of the transaction does not effect the enforcement of the TILA violations and Plaintiff's rescission rights stemming from the lack of proper TILA notifications because the "sophisticated buyer" exception does not apply to TILA, as applied to this case.

20. Upon proper rescission of a mortgage loan, the security interest is dissolved and the borrower must return the loan proceeds to the lender. Semar, 791 F.2d at 705. However, the borrower "is not liable for any finance or other charge," including interest. 15 U.S.C. §§ 1605(a), 1635(b). Thus, the proper formula in determining this figure is to take the loan amount less all charges in the loan agreement. Specifically, a borrower is entitled to have her mortgage loan and underlying security canceled upon payment by the borrower to the lender (or assignee) of the original principal amount less the sum of the original closing costs and all payments made on the loan.

21. Since the mortgage loan was properly rescinded by Plaintiff, the security interest established by the

transaction is hereby dissolved.

22. Further, Plaintiff must return the loan proceeds to the lender, less any finance or other charge. Here, Plaintiff has made payments to the lender and/or Defendant equaling $198,629.68. However, $23,010.39 of the payment was made by Plaintiff to cover her then-existing obligations. Thus, her payments made on the loan agreement itself equal $175,619.29.

23. The original principal amount of the loan less any finance or other charge is $519,822.96. As a result, Plaintiff must make payment to Defendant BNY in the amount of $344,203.67 within 120 days.

24. If a borrower obtains rescission under TILA, the creditor is liable for "a reasonable attorney's fee as determined by the court." Semar, 791 F.2d at 706; 15 U.S.C. § 1640(a)(3).

25. Since Plaintiff properly obtained rescission under TILA, Defendant BNY is liable for Plaintiff's reasonable attorney's fees related to this litigation, to be determined by Magistrate Judge Yamashita at a later hearing.

CONCLUSION

Any findings of fact which should more properly be deemed conclusions of law and any conclusions of law which should more properly be deemed findings of fact shall be so construed.

Pursuant to its findings and conclusions herein, the court hereby orders that judgment be entered in favor of Plaintiff. Having previously dismissed all other claims against all other Defendants, the court hereby directs the entry of judgment for Plaintiff and retains jurisdiction to determine the appropriate amount of attorney's fees and costs.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii; August 17, 2000.

DAVID ALAN EZRA
CHIEF UNITED STATES
DISTRICT JUDGE

II. Judgment in a Civil Action, filed August 22, 2000

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ESTRELLITA G. MIGUEL,	)	CV. NO. 97-01593 DAE
	)	
Plaintiff,	)	JUDGMENT IN A CIVIL
vs.	)	ACTION
	)	
ALLIANCE BANCORP, et al.,	)	
	)	
	)	*FILED AUGUST 22, 2000*
Defendants.	)	
	)	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to its findings and conclusions, the court orders that Judgment be entered in favor of Plaintiff. The Court having previously dismissed all other claims against all other defendants, the court hereby directs the entry of judgment for plaintiff.

August 22, 2000 *WALTER A.Y.H. CHINN*
CLERK

III. Order Granting Defendant The Bank of New York Trustee under the Pooling and Servicing Agreement Series 1995 B's Motion To Amend Findings of Fact and Conclusions of Law and To Amend the Judgment, filed October 5, 2000

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ESTRELLITA G. MIGUEL,	CV. NO. 97-01593 DAE
Plaintiff,	ORDER GRANTING
vs.	DEFENDANT THE BANK
	OF NEW YORK TRUSTEE
ALLIANCE BANCORP, et al.,	UNDER THE POOLING
	AND SERVICING
	AGREEMENT SERIES
Defendants.	1995 B'S MOTION TO
	AMEND FINDINGS OF
	FACT AND
	CONCLUSIONS OF LAW
	AND TO AMEND THE
	JUDGMENT
	FILED OCTOBER 5, 2000

ORDER GRANTING DEFENDANT THE BANK OF NEW YORK TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT SERIES 1995 B'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO AMEND THE JUDGMENT

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Defendant The Bank of New York Trustee under the Pooling and Servicing Agreement Series 1995 B's ("Defendant") Motion.

BACKGROUND

On August 22, 2000, the court issued the Findings of Fact and Conclusions of Law and entered judgment in favor of Plaintiff, holding that Defendant, as assignee, is liable for Alliance Bancorp's ("Alliance") TILA violations. Further, the court held that Defendant must rescind the security interest on Plaintiff's home and pay for Plaintiff's attorney's fees and costs. However, the court also held that Plaintiff must return the loan proceeds to Defendant, less any finance or other charge, in the amount of $344,203.67 within 120 days.

Arguing that the rescission of the security interest should be conditioned on the repayment of the loan principal and that Plaintiff is not entitled to attorney's fees since Alliance's violations were not apparent on the disclosure statements, Defendant filed this Motion on September 6, 2000. Plaintiff filed her Opposition on September 19, 2000 and Defendant filed its Reply on October 3, 2000.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 52(b) allows a party to file, within 10 days of the entry of judgment, a motion to amend the court's findings or make additional findings. Upon this motion, a court may amend the judgment to correct manifest errors of law or fact. Fed. R. Civ. P. 52(b); see also, Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1220 (5th Cir. 1986) .

DISCUSSION

In its Motion, Defendant argues that the Findings of Fact and Conclusions of Law should be amended to reflect two errors made by the court. First, it contends that the rescission of the security interest in Plaintiff's home should be conditioned on repayment of the loan principal, less finance or other charges. Second, it claims that the court's award of attorney's fees and costs to Plaintiff constitutes an error because the TILA violations were not apparent on the disclosure documents. The court will now consider each issue in turn.

A. Whether Rescission is Conditioned on Plaintiff's Repayment of the Principal

In the Findings of Fact and Conclusions of law, after finding that Plaintiff is entitled to rescission and properly notified Defendant of her intention to rescind, the court held the following:

> 20. Upon proper rescission of a mortgage loan, the security interest is dissolved and. the borrower must return the loan proceeds to the lender. Semar, 791 F.2d at 705. However, the borrower "is not liable for any finance or other charge," including interest. 15 U.S.C. §§ 1605(a), 1635(b). Thus, the proper formula in determining this figure is to take the loan amount less all charges in the loan agreement. Specifically, a borrower is entitled to have her mortgage loan and underlying security canceled upon payment by the borrower to the lender (or assignee) of the original principal amount less the SUM of the original closing costs and all payments made on the loan.
>
> 21. Since the mortgage loan was properly rescinded by Plaintiff, the security interest established by the transaction is hereby dissolved.
>
> 22. Further, Plaintiff must return the loan proceeds to the lender, less any finance or other charge.

Defendant argues that these conclusions constitute error because the court failed to condition rescission upon the return of the outstanding loan principal balance.

Under TILA once a creditor, or assignee, receives the

amount to be rescission notice, it must remove the security interest from the property within twenty days. 15 U.S.C. § 1635(b). However, upon rescission, the borrower must return the loan proceeds, less "any finance or other charge," including interest, to the lender. Semar, 791 F.2d at 705 (citing 15 U.S.C. §§ 1635(b), 1605(a)). Additionally, if the lender's TILA violations are not egregious, it is "appropriate to condition rescission of the mortgage on [a p]laintiffs' tender of repayment." Riopta v. Amresco Residential Mortgage Corporation, 101 F. Supp. 2d 1326, 1335 (D. Haw. 1999)

In this case, it is clear that Defendant's violations were not egregious since they were merely technical violations of TILA. Further, the court intended to condition rescission upon Plaintiff's return of the loan principal, in the amount of $344,203.67, in the initial judgment since it is in the interests of justice. Thus, the court agrees with Defendant and finds that, while Plaintiff is entitled to rescission of the security interest, her ability to rescind is conditioned on her tender of repayment of the loan proceeds, less any finance, closing and interest charges.

Consequently, the court GRANTS Plaintiff's [sic] Motion to the extent it seeks a conditional rescission and AMENDS Conclusion of Law No. 21 to read:

> The court concludes that Plaintiff is entitled to rescission; however, since the TILA violations were not egregious, rescission of the security interest in Plaintiff's property is conditioned on Plaintiff's repayment of the balance of the loan proceeds, less any finance, closing or interest charges. Riopta v. Amresco Residential Mortgage Corporation, 101 F. Supp. 2d 1326, 1335 (D. Haw. 1999). Thus, upon repayment of the loan principal balance, the security interest established by the transaction will be immediately dissolved.

B. Attorney's Fees under Section 1640

Additionally, Plaintiff seeks attorney's fees and costs under 15 U.S.C. § 1640 since Defendant, as assignee, is liable for Alliance's TILA violations. Also, she contends that attorney's fees are appropriate because Defendant violated TILA. by failing to properly rescind the security interest after receiving Plaintiff's notice.

Generally, if plaintiffs are deemed to have a right to rescission, they are also entitled to "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(a) (3). However, section 1641 states that assignees are liable for attorney's fees and costs "if the disclosure violations made by the original lender are 'apparent on the face' of the disclosure documents." Rowland v. Novus Financial Corp., 949 F. Supp. 1447, 1457-58 (D. Haw. 1996).

After reviewing the record and arguments presented, the court concludes that an error is present in the Findings of Fact and Conclusions of Law. Accordingly, the court now holds that Defendant is not liable for TILA damages, as well as attorney's fees and costs, in this case since Alliance's violations were not "apparent on the face" of the disclosure documents. It was not obvious to Defendant when it assumed the role of assignee that the documents were flawed. Rather, Defendant's copy of the Notice of Right to Cancel was a properly executed copy, with no indication that the Miguels did not have the same copy.

Additionally, Plaintiff argues that Defendant also violated TILA itself by not properly rescinding the security interest upon notice of rescission. However, this argument is misplaced since Plaintiff never offered to repay the outstanding principal balance on the loan. Riopta, 101 F. Supp. 2d at 1334-36 (holding that it is proper to condition rescission of a mortgage upon repayment (or tender of repayment) of the loan principal). Thus, the court holds that Defendant is not required to release its security interest in Plaintiff's property until Plaintiff has tendered repayment, less any finance or other charges, in an

determined at a later hearing. Thus, she was never entitled to immediate rescission and Defendant did not violate TILA itself.

As a result, the court GRANTS Plaintiff's [sic] Motion to the extent it covers attorney's fees and costs and AMENDS the Conclusion of Law No. 24 to read:

> If a borrower obtains rescission under TILA the creditor is liable for "a reasonable attorney's fee as determined by the court." Semar, 791 F.2d at 706; 15 U.S.C. § 1640(a) (3). However, section 1641 states that assignees are liable for attorney's tees and costs "if the disclosure violations made by the original lender are 'apparent on the face' of the disclosure documents.". Rowland v. Novus Financial Corp., 949 F. Supp. 1447, 1457-58 (D. Haw. 1996).

Also, the court AMENDS Conclusion of Law No. 25 to read:

> Since Alliance's violations were not apparent on the face of the disclosure documents when Defendant BNY took over as assignee, Defendant BNY is not liable for Plaintiff's reasonable attorney's fees related to this litigation.

CONCLUSION

For the reasons stated above, the court GRANTS Defendant's Motion to Amend Findings of Fact and Conclusions of Law and to Amend the Judgment, as set forth above.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii; October 5, 2000.

DAVID ALAN EZRA
CHIEF UNITED STATES
DISTRICT JUDGE

IV. Judgment in a Civil Action, filed October 12, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ESTRELLITA G. MIGUEL,	CV. NO. 97-01593 DAE
Plaintiff,	JUDGMENT IN A CIVIL
vs.	ACTION
ALLIANCE BANCORP, et al.,	
	FILED OCTOBER 12, 2000
Defendants.	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that an AMENDED JUDGMENT is entered pursuant to the "Order GRANTING Defendant The Bank of New York Trustee under the Pooling and Servicing Agreement Series 1995 B's Motion To AMEND Findings of Fact and Conclusions of Law and To AMEND the Judgment" filed on October 5, 2000, [sic] the court GRANTS Plaintiff's [sic] Motion to the extent it seeks a conditional rescission and AMENDS Conclusion of Law No. 21 as stated in the "Order" filed on October 5, 2000. IT IS FURTHER ORDERED that the court GRANTS Plaintiff's [sic] Motion to the extent it covers attorney's fees and costs and AMENDS the Conclusion of Law No. 24, [sic] also,

the court AMENDS Conclusion of Law No. 25 as stated in the "Order" filed on October 5, 2000.

October 12, 2000

WALTER A.Y.H. CHINN
CLERK

No. 02-1495

Supreme Court, U.S.
FILED
MAY 9 - 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ESTRELLITA G. MIGUEL,

Petitioner,

vs.

THE BANK OF NEW YORK, TRUSTEE, UNDER THE POOLING & SERVICING AGREEMENT SERIES 1995 B; ALLIANCE BANKCORP, a corporation; and COUNTRYWIDE FUNDING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PARTIES TO THE PROCEEDING AND SUPREME COURT RULE 29.6 STATEMENT

In addition to the parties listed on the caption of the case in this Court, Respondent, The Bank Of New York, Trustee Under The Pooling And Servicing Agreement Series 1995 B ("BNY"), discloses the following: Independent National Mortgage Corp., doing business as IndyMac (currently known as IndyMac Bank, F.S.B.), The Bank Of New York (not as trustee) and Countrywide Home Loan were originally defendants in the District Court action. All were dismissed by agreement early in the litigation and the Petition does not raise any issues with respect to them.

BNY is controlled by The Bank Of New York which is a publicly traded company on the New York Stock Exchange. No entity owns 10% or more of BNY's stock.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals in *Miguel v. The Country Funding Corp.*, Hawaii District Court No. CV-97-01593 is reported at 309 F.3d 1161 (9th Cir. 2002) and is found in the Appendix in the Petition For Writ Of Certiorari (hereafter, "Pet. Appx. at [page]").

Several Hawaii District Court orders are included in Petitioner's Supplemental Appendix (hereafter, "Pet. Supp. Appx. at [page]"): (1) Findings Of Fact And Conclusions Of Law, filed August 17, 2000 (Exhibit I); (2) Judgement In A Civil Action, filed August 22, 2000 (Exhibit II); (3) Order Granting Defendant The Bank Of New York Trustee Under The Pooling And Servicing Agreement Series 1995 B's Motion To Amend Findings Of Fact And Conclusions Of Law and to Amend the Judgment, filed October 5, 2000 (Exhibit III); and (4) Judgment In A Civil Action, filed October 12, 2000 (Exhibit IV).

None of the District Court Orders are reported.

STATEMENT OF THE CASE

I. THE UNDERLYING CREDIT TRANSACTION BETWEEN MIGUEL AND ALLIANCE.

Plaintiff, Appellant and Petitioner, Estrellita G. Miguel ("Miguel") and her husband entered into a credit transaction with Alliance Bank Corp. ("Alliance") on December 1, 1994. Pet. Appx. at p. 6. Defendant, Appellee, Cross-Appellant and Respondent BNY acquired its lien against Miguel on October 17, 1996 by assignment. *Id.* at 6.

On November 7, 1997, (twenty-three days before the running of the three year limitation of 15 U.S.C. § 1635(f)), Miguel sent a certified letter to Countrywide Funding Corporation ("Countrywide") purporting to cancel her loan. Miguel sought rescission and cancellation of her mortgage on the grounds that she received a defective Truth In Lending Act ("TILA") Disclosure Statement from Alliance on December 1, 1994. *Id.* at 5. Countrywide was the servicer of the loan. *Id.* (It was neither the "creditor" under 15 U.S.C. § 1602(f) of TILA, which was Alliance, nor the "assignee" under TILA, which was BNY.) No evidence was adduced below showing that BNY ever received contemporaneous notice of Miguel's purported cancellation. *Id.* at 7.

II. THE DISTRICT COURT PROCEEDINGS.

On December 1, 1997, exactly three years after making the loan with Alliance, Miguel filed suit against Countrywide alone, seeking rescission. *Id.* at 6.

Miguel admitted that she first learned that BNY was the lien holder only on March 19, 1998. On March 26, 1998, Miguel filed a Motion For Leave To File An Amended Complaint which sought to "substitute" BNY in the place of Countrywide. *Id.* at 7.

On April 21, 1998, Miguel filed a Second Motion For Leave To File A Second Amended Complaint. This Motion sought to add additional parties to Miguel's suit, including BNY. There was no evidence below to show that BNY had any notice of these motions or any contemporaneous knowledge of the existence of the lawsuit. *Id.*

On June 17, 1998, Miguel filed her "2nd Amended Complaint; Demand For Truth In Lending Act Rescission"

against, *inter alia*, BNY. Resp. Appx. A. Service was effected on BNY on November 9, 1998. *Id.*

Miguel's Second Amended Complaint sought only rescission against BNY. No facts were pleaded or claim made that BNY, as assignee, had independently violated TILA by, for example, failing to immediately cancel the loan upon Miguel's November 7, 1997 demand to Countrywide. *Id.* at 5, 6; Resp. Appx. A.

On or about June 1, 1999, the District Court heard arguments on a Motion For Summary Judgment by BNY. The District Court, by order filed June 3, 1999, denied BNY's motion and held that Miguel's November 27, 1997 notice of cancellation was effective under TILA where the notice was sent only to the servicer (Countrywide) and not to the assignee (BNY). The District Court also held, "Defendant Bank Of New York admits that it received Plaintiff's Notice within three years of the loan transaction." *Id.*

There is no evidence in the record which supports a finding that BNY, as opposed to Countrywide, "admitted" receiving, or ever received, Plaintiff's notice of cancellation. (Indeed BNY's trial counsel later argued: "There is no testimony proffered before your Honor about notice [of the cancellation] being given to [The] Bank Of New York." The District Court did not disagree: "She [Miguel] said she didn't know anything about it. She said – she testified she didn't know about [The] Bank Of New York." Trial Transcript 60:10-15.)

After trial on August 2, 2000, by Order filed August 17, 2000, the District Court ordered rescission for Miguel, holding: "By sending, via certified mail, a mortgage cancellation notice to the [sic] Alliance Bank Corp.'s assignee,

Defendant BNY, on November 7, 1997, Plaintiff effectively and timely exercised her right to rescind under TILA since she cancelled the transaction prior to December 1, 1997." Pet. Supp. Appx., at 8. The District Court also ordered BNY to pay Miguel's attorneys' fees pursuant to 15 U.S.C. § 1640(a). *Id.* at 9.

BNY challenged the fee award and moved to amend the judgment pursuant to Fed. R. Civ. Proc., Rule 59(e), which on October 5, 2000, the District Court granted. Pet. Supp. Appx. at 11. There, the District Court ordered that BNY was not liable for damages or attorneys' fees, under 15 U.S.C. § 1640(a)(3), because the violations of the original lender were not apparent "on the face" of the disclosure documents and thus "not obvious" to BNY when it assumed the role of assignee. *Id.* at 15.

It was only in response to BNY's post-trial motion on the fees issue that Miguel first asserted, in passing, that BNY directly violated TILA "by failing to properly rescind the security interest after receiving Plaintiff's notice." *Id.* at 15. The District Court rejected this claim on the merits since "Plaintiff never offered to pay the outstanding principal balance [and was therefore] never entitled to immediate rescission and Defendant BNY did not violate TILA itself." *Id.* at 15-16.

Miguel has never sought leave to amend her complaint to assert a damage claim against BNY.

III. PROCEEDINGS BEFORE THE NINTH CIRCUIT.

Miguel appealed, *inter alia*, the denial of fees, although she did *not* argue that the District Court erred by

denying her damage claim for failure to tender. BNY cross-appealed asserting, *inter alia*, that the District Court lacked subject matter jurisdiction over Miguel's rescission claims, given the statute of repose of 15 U.S.C. § 1635(f). Miguel's Ninth Circuit "Reply/Answering Brief" argued the existence of jurisdiction and asserted that BNY was liable to Miguel for *damages* pursuant to 15 U.S.C. § 1640 for failing to immediately rescind pursuant to the demand on Countrywide. Pet. Appx. at p. 10. Miguel's theory was that when BNY failed to rescind on November 7, 1997, the one year limitation of 15 U.S.C. § 1640(e) began to run and that it had not expired by the time she commenced her rescission action against BNY. *Id.*

The Ninth Circuit reversed the District Court's judgment of rescission, holding that there was no subject matter jurisdiction and remanded with an order to dismiss. The Ninth Circuit held, *inter alia*, (1) following *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994) that "the party asserting federal jurisdiction has the burden of establishing it;" (2) following *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), that the TILA rescission statute of 15 U.S.C. § 1635(f) is a statute of repose rather than a statute of limitation; (3) that "because Miguel did not attempt to rescind against the proper entity within the three year limitation, her right to rescind expired;" and (4) that Miguel failed to file suit against the correct party within the three year limitation period and she could not extend the statute by amending to add a new party outside the three year period (and in any event was not in compliance with the time limitations of Fed. R. Civ. Proc., Rule 15). *Id.* at 8-12.

The Ninth Circuit also short-circuited Miguel's putative damage claim, holding that the cancellation letter she

sent November 7, 1997, to the servicer, Countrywide, was not an effective rescissionary notice to BNY, noting "no authority supports the proposition that notice to Countrywide should suffice for notice to the Bank." Pet. Appx. p. 10. Because there was no effective notice of cancellation within the three year period, the right to cancel was extinguished and demands made after the extinguishment of the right gave rise to no jurisdiction. *Id.* at 11-12.

REASONS FOR DENYING THE PETITION

Miguel does not question the Ninth Circuit's determination that the statute of repose, found at 15 U.S.C. § 1635(f), deprived the court of subject matter jurisdiction of her rescission claims. She also never appealed from – and thus abandoned any objection to – the District Court's determination that her damage claim, based on BNY's failure to rescind, was meritless. However, she now claims the Ninth Circuit erred, asserting that subject matter jurisdiction existed by virtue of her abandoned damage claim. Miguel argues that, (1) she properly rescinded against BNY within the three year statute of repose by serving her November 7, 1997 cancellation notice on the servicer, Alliance; (2) BNY is liable in damages for failing to immediately cancel on November 7, 1997; and (3) the one year statute of limitation of 15 U.S.C. § 1640 extends the three year § 1635(f) statute of repose by one year. Miguel also argues that the Ninth Circuit ignored the District Court's "finding" that BNY had notice of her claim on or about November 7, 1997, and therefore the Ninth Circuit erred in determining that her notice of cancellation was ineffective.

Miguel's Petition should not be granted.

First, Miguel's Petition is flawed on procedural grounds. She concedes, by not challenging, that the Ninth Circuit correctly held her rescission claims barred. Accordingly, now both prongs of her Petition are premised on jurisdiction flowing from damage claims concocted post-trial. Because these are claims which were not made below in any cognizable pleading, Miguel's Petition is an impermissible attempt to bootstrap subject matter jurisdiction upon an entirely new claim. Jurisdiction cannot flow from claims which were not made below nor should this Court grant an amendment she never sought.

Second, the District Court was correct that, on the merits, the damage claim failed. Miguel in any event waived because she failed to appeal the District Court's adverse determination on that claim. Third, the Ninth Circuit was correct that a TILA notice of cancellation, which is not given to the entity against whom rescission is sought, cannot be effective. Fourth, the Ninth Circuit was *not* required to accept District Court "findings" which do not exist and/or which are totally unsupported by the record.

Finally, Miguel cites no apposite authority for the position she espouses. No split in the federal circuits or split between a circuit and a state's highest court exists; nor is there any claim that this is a weighty matter of national importance, justifying the expenditure of this Court's limited resources.

I. MIGUEL'S NEW CLAIM OF SUBJECT MATTER JURISDICTION IS NOW ILLEGITIMATELY PREMISED UPON A CLAIM NEVER PLEADED.

Miguel filed a claim for rescission in District Court on December 1, 1997, the last day of the three year statute of repose for rescission claims. She filed a rescission claim only against the wrong party, Countrywide. She amended, by filing on June 17, 1998, to add new parties, including BNY. As found by the Ninth Circuit – and not challenged in her Petition – her suit against BNY was outside the statute of repose for rescission and the amendment thus constituted an impermissible extension of the district court's subject matter jurisdiction.

After trial on the rescission claim, and only in her opposition to BNY's post trial Fed. R. Civ. Proc., Rule 59(e) motion to amend the judgment, Miguel asserted, for the first time, a *damage* claim – an alleged direct violation of TILA, premised on BNY's failure to immediately rescind upon the November 7, 1997 demand. The District Court denied the belated damage claim on the merits, holding BNY had no obligation to respond to Miguel's demand. Pet. Supp. Appx. at p. 15. The Ninth Circuit did not reach the District Court rationale because it held there was no jurisdiction, since no effective cancellation was made within the three year period. Pet. Appx. at 10-11.

A. Miguel's Belated – And Still Unpleaded – Damage Claim Cannot Establish Jurisdiction.

Miguel never pleaded a damage claim against BNY premised on a failure to cancel.

Miguel was obliged to plead the basis "upon which the court's jurisdiction depends . . . " Fed. R. Civ. Proc., Rule 8(a)(1). Miguel had the burden of establishing federal jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994). The ostensible basis of jurisdiction, her rescission claim under 15 U.S.C. § 1635, has been precluded by the Ninth Circuit in a ruling Miguel does not challenge. Her newfound alternative jurisdictional "hook" – the damage claim – was not pleaded. Because there is no pleading that BNY violated TILA by failing to rescind, Miguel cannot meet her burden of having pleaded facts establishing jurisdiction. Fed. R. Civ. Proc., Rule 8(a).

B. Miguel Sought No Amendment, Which Would Have Been Futile In Any Event.

Miguel never sought leave to file an amended complaint asserting a direct TILA violation by BNY. The District Court was under no obligation to *sua sponte* amend when she first indirectly raised the issue in her opposition to BNY's post trial motion to amend. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1280 (D.C. Cir. 1994).

Even if leave was sought it could not be granted since this Court has disallowed the creation of jurisdiction by amendment. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831-32 (1989). While a court can remedy inadequate jurisdictional allegations, it cannot remedy defective jurisdictional facts. The court may not allow, via amendment, the creation of an entirely new jurisdictional basis to provide competence to a court which originally lacked the requisite authority. *Whitmire v. Victus Limited T/A*

Master Design Furniture, 212 F.3d 885, 888 (5th Cir. 2000), *citing, Falise v. American Tobacco Co.*, 241 B.R. 63 (E.D.N.Y. 1999). As stated by the Ninth Circuit: "If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.' [W]e must examine the []original complaint to determine whether [there was] jurisdiction. If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities." *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *citing*, 15 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3844 (1986). Citations omitted.

Here the original basis of Miguel's jurisdiction has been found to be illusory. Miguel cannot now amend to create entirely new allegations relating to events in 1997 respecting BNY as opposed to events in 1994 respecting Alliance. She may not add "facts" not alleged in the original complaint in an effort to establish jurisdiction, thus creating an entirely new cause of action and a new basis of jurisdiction.

Also, Miguel could not prevail in a motion pursuant to Rule 15, Fed. R. Civ. Proc. Since the one year statute of 15 U.S.C. § 1640(e) expired on November 7, 1998 (i.e. one year after her demand), she would now need to show that her damage claim "relates back". Relating back only occurs if the damage claim "arose out of the conduct, transaction or occurrence set forth . . . in the original pleading." Rule 15(c)(2), Fed. R. Civ. Proc. Her new claim could not "relate back" since it would center on BNY's alleged wrong on November 7, 1997, not to the alleged wrongs of Alliance on December 1, 1994. Indeed, if her claims did arise out of the same conduct alleged in the original complaint, two things

would follow: (1) the one year statute ran on December 1, 1995 and (2) her "tacking" is an impermissible attempt to expand the three-year 15 U.S.C. § 1635(f) statute of repose by an additional year.

C. Miguel's Damage Claims Were Waived Since The District Court's Denial Of That Claim Was Never Challenged.

Miguel never raised with the Ninth Circuit any challenge to the determination of the District Court that her damage claim failed on the merits. Accordingly, she has abandoned that claim. *Castellano v. City of New York*, 142 F.3d 58, 72 (2d Cir. 1998), *cert. denied*, 525 U.S. 820 (1998). ("[Because] appellants failed to raise the [] issue on appeal, they have abandoned it."); *Medical Laboratory Mgmt. Consultants v. Am. Broad Cos.*, 306 F.3d 806, 820 n. 8 (9th Cir. 2002) (party waived claim by failing to present it in the district court or in its opening brief). Jurisdiction cannot be premised on an abandoned claim.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT NEITHER AGENCY PRINCIPLES NOR TILA ALLOW FOR CANCELLATION AGAINST AN ASSIGNEE BY GIVING NOTICE TO A SERVICER.

Miguel argues that general agency principles allow her to give a TILA notice of rescission to Countrywide, the loan servicer, rather than to BNY, the obligee itself. As the Ninth Circuit noted, there is no support for such a proposition and Miguel cited (and still cites) none.

A. TILA Precludes "Substitute" Notice Upon A Servicer When Rescission Is Sought Against The Assignee.

TILA, at 15 U.S.C. § 1635(a), allows for rescission against the creditor "by notifying the creditor in accordance with regulations of the Board, of his intention to do so." "Creditor" is a defined term and refers only to "the person to whom the debt . . . is initially payable on the face of the evidence of indebtedness . . . ." 15 U.S.C. § 1602(f).

TILA also allows for rescission against an assignee of the creditor. 15 U.S.C. § 1641(c). However, TILA does not prescribe how or to whom notice of such rescission is to be effected. Courts have held that TILA rescission against an assignee may be accomplished in two ways: (1) by giving notice to the original creditor; *Shepeard v. Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1304-06 (D. Del. 1990) (rejecting assignee's claim that it needed notice of rescission separate from the creditor); and (2) by giving notice directly to the assignee. *See, e.g., Stone v. Mehlberg*, 728 F. Supp. 1341 (W. D. Mich. 1989). There are *no* decisions which support the proposition that a cancellation can be effected by mailing a notice to an assignee's purported agent. Such proposition is contrary to settled agency law, particularly, as here, where no proof was proffered as to the scope of the agent's authority to accept such notice.

Miguel's cancel-by-mailing-to-the-servicer theory runs afoul of TILA itself, at 15 U.S.C. § 1641(f). There, Congress provided that the servicer cannot be "treated" as if it were the assignee:

> A servicer of a consumer obligation arising from a consumer credit transaction *shall not be treated as an assignee* of such obligation for purposes of

> this section unless the servicer is or was the owner of the obligation.

15 U.S.C. § 1641(f) (emphasis added). Section 1641(c) gives the consumer a right of rescission against the assignee, but § 1641(f) specifically precludes "treating" the servicer as the assignee. Thus, Miguel is precluded from "treating" the servicer as the assignee in sending her cancellation notice. Congress was clearly aware that servicers play an important role in providing credit but frequently have an attenuated relationship with the entity actually providing the funds. Section 1641(f) precludes a borrower from presuming that the assignee and servicer are one for purposes of TILA.

This interpretation is buttressed by the portions of section 1641(f) which provide that the servicer is required to provide the borrower with the name, address and telephone number of the owner of the obligation. Thus, a consumer has ample opportunity to rescind under the statutory scheme by (1) cancelling with the original obligee (the "creditor") or (2) by learning the identity of the assignee and cancelling directly with it.

B. Miguel Cites No Authority Which Supports The Proposition That A Rescission Notice To The Servicer Can Bind The Assignee.

Miguel mistakenly argues that *Greer v. O'Dell*, 305 F.3d 1297, 1302 (11th Cir. 2002) and *Meyers v. City Corp. Mortgage, Inc.*, 878 F. Supp. 1553, 1558 (M. D. Ala. 1995) stand for the proposition "that for practical purposes 'the servicing agent of the mortgage was the [assignee of the creditor under TILA]'" (Petition at 4) and, thus, that

notification of rescission to the servicer is the same as notification to the assignee.

Had either *Greer* or *Meyers* so held, they would be in conflict with 15 U.S.C. § 1641(f). *See*, *supra*. In fact, neither does. *Greer* dealt with standing and has nothing to do with notice issues; it concerned "whether a loan servicer is a real party in interest with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services." *Id.* at 305 F.3d at 1302. In *Greer*, there was an explicit grant of authority to the servicer by the assignee.

Similarly inapposite is *Meyers v. Citicorp Mortgage, Inc.*, 878 F. Supp. 1553 (M.D. Ala. 1995) where Citicorp formally – albeit briefly – became the assignee of a loan before reassigning it. The borrower asserted "assignee" liability against Citicorp under TILA. Citicorp objected, claiming it was not an assignee since it had held the mortgage only for a short time and "promptly reassigned the mortgage." *Id.* at 1558. *Meyers* simply held that "it is clear that Citicorp was at one time, if only for an instant, an assignee of a creditor." *Id.* Neither *Greer* nor *Meyers* support the proposition that a rescission can be accomplished without giving notice to the party against whom rescission is sought.

Kittel v. First Union Mortgage Corporation, 2001 WL 4047942 (W.D. Okla. 2001), *stayed*, 303 F.3d 1193 (10th Cir. 2002), also cited by Miguel, is irrelevant. There is no relationship between the compulsory counterclaim rule implicated in *Kittel* and the notice requirements for rescission here at issue.

III. THE NINTH CIRCUIT WAS NOT BOUND BY "FACTS" ALLEGEDLY FOUND BY THE DISTRICT COURT WHICH WERE UNSUPPORTED BY THE RECORD.

As a second point of error, Miguel argues the Ninth Circuit erred because it "rejected" the District Court's purported "finding" that BNY had knowledge of Miguel's November 7, 1997 cancellation. Miguel variously argues (1) that Circuit Court illegitimately reversed an alleged pre-trial holding of the District Court that BNY "admitted" knowledge of Miguel's claims, (2) BNY "table funded" the loan and was therefore the original obligor under TILA; and (3) BNY "hid" its ownership and should be estopped to claim it is an assignee.

Miguel's scatter-shot fusillade must fail. Her factual assertions are vigorously contested and the lower courts adopted none of these claims. Further, factual issues are peculiarly inappropriate for a petition for certiorari: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ." Rules of the Supreme Court of the United States, Rule 10.

As a factual matter the alleged determination of the BNY "admission" by the District Court was ambiguous at best, and, if intended to be a determination of the state of BNY's knowledge as of November 7, 1997, was simply wrong and unsupported by the record. The actual record reflects no such admission. BNY did *not* admit – and there was no evidence – that it had any knowledge of Miguel's claimed cancellation prior to the running of the three-year statute. (The District Court language Miguel cites refers to BNY's non-opposition to the assertion that *Countrywide* was sent the cancellation notice on November 7, 1997, as opposed to some later date.)

Miguel's assertions about table-funding are pure smoke. Miguel has cited nothing that could result in a finding that BNY was anything but an assignee.

Finally, Miguel argues that this Court should accept its Petition in order to review the facts and impose an estoppel on BNY. Even if all Miguel asserted were true (and it is not) it would be to no avail. Equitable doctrines like waiver or estoppel cannot vest the courts with jurisdiction they lack. *E.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988).

IV. THIS CASE DOES NOT MEET THIS COURT'S REQUIREMENTS FOR REVIEW.

Normally this Court will consider only cases where there is a conflict between federal courts of appeal or between a federal court of appeal and the court of highest jurisdiction of a state. As evidenced by the authorities cited by Miguel, such is not the case here. No other circuit has ruled on the efficacy of notification to the servicer binding the assignee.

Miguel's second assertion that the Ninth Circuit made an erroneous factual finding when it refused to give credence to alleged District Court factual "findings" is even less worthy of this Court's attention. Parsing allegedly erroneous factual findings is not the function of this Court. Rules of the Supreme Court of the United States, Rule 10.

CONCLUSION

For the foregoing reasons, Respondent, The Bank Of New York, Trustee, respectfully requests that this Court deny Miguel's Petition For Certiorari.

DATED: Honolulu, Hawaii, May 9, 2003.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ESTRELLITA G. MIGUEL, Plaintiff, vs. ALLIANCE BANCORP, a California corporation, THE BANK OF NEW YORK; THE BANK OF NEW YORK Trustee under the Pooling & Servicing Agreement Series 1995 B; INDEPENDENT NATIONAL MORTGAGE CORP. dba INDY MAC and its affiliates and successors; COUNTRYWIDE FUNDING CORPORATION; COUNTRYWIDE HOME LOANS and its assigns; Defendants.	Civil No. 97-01593 DAE 2ND AMENDED COMPLAINT; DEMAND FOR TRUTH IN LENDING ACT RESCISSION; EXHIBITS "A-C"; SUMMONS (Filed June 17, 1998)

2ND AMENDED COMPLAINT: DEMAND FOR TRUTH IN LENDING ACT RESCISSION

I. PRELIMINARY STATEMENT

1. This 2nd Amended Complaint is filed under the Truth in Lending Act and made pursuant to Rule 15(b)

of the Federal Rules of Civil Procedure, to enforce Plaintiff's right to rescind the contract, void Defendant's security interest in Plaintiff's Home, and to recover statutory damages, reasonable attorney's fees and costs by reason of Defendant's violations of the Truth in Lending Act, (hereinafter called TILA) 15 U.S.C. § 1601 et seq., and 12 C.F.R. 226 (hereinafter called Regulation Z).

II. JURISDICTION

2. Jurisdiction is conferred on this Court by 15 U.S.C. § 1640(e) and 28 U.S.C. §§ 1331, 1337.

III. PARTIES

3. The Plaintiff, ESTRELLITA G. MIGUEL, is a natural person, residing at 98-797 Ainanui Loop, Aiea, Hawaii 96701.

4. The Defendant, ALLIANCE BANCORP, the original lender for this subject loan, has a business address at 800 El Camino Real, Millbrae, California 94030.

5. The Defendant, THE BANK OF NEW YORK, is a financial corporation located at 101 Barclay Street, New York, NY 10286.

6. The Defendant, THE BANK OF NEW YORK TRUSTEE under the Pooling and Servicing Agreement Series 1995 B located at 101 Barclay Street, New York, NY 10286, Corp Trust-MBS INC., in the state of NY.

7. The Defendant, COUNTRYWIDE FUNDING CORPORATION conducts its business at 155 North Lake Avenue, Pasadena, CA 91109.

8. The Defendant, COUNTRYWIDE HOME LOANS, has a mailing address at P.O. Box 10222, Van Nuys, CA 91410-0222.

9. The Defendant, INDEPENDENT NATIONAL MORTGAGE CORPORATION, dba as INDY MAC and its assigns or affiliates whose addresses are presently unknown.

IV. FACTUAL ALLEGATIONS

10. On December 1, 1994, Plaintiff entered into a consumer credit transaction with Defendant ALLIANCE BANCORP in which the extended credit was subject to a finance charge and which was initially payable to Defendant ALLIANCE BANCORP.

11. A true and accurate copy of the credit agreement evidencing the transaction is attached hereto, marked ***PLAINTIFF'S EXHIBIT "A"*** and by this reference is incorporated herein.

12. As part of this consumer credit transaction, the Defendant ALLIANCE BANCORP retained a security interest in Plaintiff's principal dwelling located at 98-797 Ainanui Loop, Aiea, Hawaii 96701.

13. A true and accurate copy of that security interest is attached hereto, marked ***PLAINTIFF'S EXHIBIT "B"***, and by this reference is incorporated herein.

14. The mortgage note and mortgage was later assigned to Defendants THE BANK OF NEW YORK, THE BANK OF NEW YORK AS TRUSTEE under the Pooling

and Servicing Agreement Series 1995 B and INDEPENDENT NATIONAL MORTGAGE CORPORATION dba INDYMAC.

V. THE TRUTH IN LENDING VIOLATIONS

15. This consumer credit transaction was subject to the Plaintiff's right of rescission as described by 15 U.S.C. § 1635 and Regulation Z § 226.23(a) which provides in pertinent part:

RIGHT OF RESCISSION

(a) Consumer's right to rescind.

(1) In a credit transaction in which a security interest is or will be retained in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, . . .

16. In the course of this consumer credit transaction, Defendant ALLIANCE BANCORP violated the disclosure provisions of TILA and Regulation Z by failing to deliver the required two copies of the notice of the right to rescind. Regulation Z § 226.23(b) provides as follows:

NOTICE OF RIGHT TO RESCIND:

(b) In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

17. In the course of this consumer credit transaction, Defendant ALLIANCE BANCORP failed to deliver all the "material" disclosures required by TILA and Regulation Z, including the following:

a. By failing to properly and accurately disclose the "amount financed," using that term in violation of Regulation Z § 226.18(b) and 15 U.S.C. § 1638(a)(2)(A).

b. By failing to clearly and accurately disclose the "finance charges," using that term, in violation of Regulation Z §§ 226.4 and 226.18(d) and 15 U.S.C. § 1638(a)(3).

c. By failing to clearly and accurately disclose the "annual percentage rate," using that term, in violation of Regulation Z § 226.18(e) and 15 U.S.C. § 1638(a)(4).

d. By failing to properly disclose the number, amounts, and timing of payments scheduled to repay the obligation, in violation of Regulation Z § 226.18(g) and 15 U.S.C. § 1638(a)(5).

18. The Plaintiff has a continuing right to rescind the transaction until the third business day after receiving both the required NOTICE OF THE RIGHT TO CANCEL as described in paragraph 16 and all "material" disclosures as described in paragraph 17, pursuant to 15 U.S.C. § 1635(a) and Regulation Z § 226.23(a)(3).

19. The right of rescission applies not only to the original lender but also to all assignes [sic] of the original mortgage transaction pursuant to TILA 15 U.S.C. § 1635(f) and 15 U.S.C. § 1641(c).

20. On November 7, 1997, Plaintiff sent a notice of cancellation to Defendant COUNTRYWIDE FUNDING CORPORATION, who was later found out to be the servicing agent instead of the assignee of the mortgage. See ***EXHIBIT "C"*** attached hereto and by this reference is incorporated herein.

21. As a result of the aforesaid violations of TILA and Regulation Z, pursuant to 15 U.S.C. § 1635(a) and 1640(a), Defendant ALLIANCE BANCORP and its assigness [sic] are subject to Plaintiff's rescission claims.

WHEREFORE, it is respectfully prayed that this Court:

1. Assume jurisdiction of this case.
2. Rescind the subject December 1, 1994 mortgage loan;
3. Order the termination of the security interest on Plaintiff's home held by the current assignee owner.
4. Order the return to the Plaintiff of any money paid by Plaintiff to anyone, including the original lender and its assignees in connection with this subject December 1, 1994 loan.

5. Enjoin Defendants during the pendency of this action and permanently thereafter, from instituting, prosecuting, or maintaining foreclosure proceedings on Plaintiff's home, from otherwise taking any steps to deprive Plaintiff of ownership and use of Plaintiff's home;

6. Award the Plaintiff costs and a reasonable attorney's fee as provided under 15 U.S.C. § 1649(a), statutory and actual damages.

7. Award such other and further relief as the Court deems just and proper in the premises.

DATED: Honolulu, Hawaii, June 11, 1998

/s/ Estrellita G. Miguel
ESTRELLITA G. MIGUEL
Plaintiff Pro Se